

Service Date: March 9, 1994

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF Employee Compensation)	UTILITY DIVISION
Information in PSC Annual Report Forms)	
for Telecommunications Utilities)	DOCKET NO. N-93-105
(Schedule 27).)	ORDER NO. 5777

PROTECTIVE ORDER

On April 2, 1990 the Montana Public Service Commission (PSC or Commission) issued a Protective Order governing the employee compensation information required by Schedule 25 [now Schedule 27] of the PSC Telecommunications Annual Report Form ("Compensation of Top 10 Montana Based Employees"). The April 2, 1990 Protective Order protected the information filed in Schedule 25 for the 1989, 1990, 1991 and 1992 Annual Report Forms.

The 1993 Annual Reports are due to be filed March 15, 1994. Therefore, on November 16, 1993 the PSC issued a Notice of Briefing Schedule inviting briefs by interested parties by December 14, 1993, and reply briefs by January 14, 1994. The Commission received briefs or comments from: US West Communications (USWC), GTE-Northwest, Southern Montana Telephone Co., Ronan Telephone Co., Hot Springs Telephone Co., Sprint Communications Company, and AT&T Communications. USWC also filed a Motion for Protective Order. All commenting parties supported the re-issuance of the April 2, 1990 Protective Order.

The PSC considered this matter at a work session on March 1, 1994. The PSC decided to issue a Protective Order for one year only -- governing Schedule 27 of the 1993 Telecommunications Annual Report Form which is due to be filed by March 15, 1994. The PSC also directed its staff to prepare revisions for next year's Annual Report, for PSC consideration. The PSC will also reconsider the Protective Order issue prior to the due date for next year's Report.

In issuing this order, the Commission is not deciding or expressing any opinion as to whether the subject information is or is not a trade secret, or otherwise constitutionally protected.

Based upon the foregoing, the following Protective Order shall be in effect with respect to Schedule 27 of the 1993 PSC Annual Report Forms filed by Telecommunications Utilities (hereinafter "providing party" or "providing parties") (due March 15, 1994):

1. Proprietary Information. All documents, data and information furnished by the providing parties in Schedule 27 of the 1993 PSC Annual Report Forms for Telecommunications Utilities claimed to be of a private, privileged or confidential nature shall only be furnished pursuant to the terms of this order, and shall be treated by all persons accorded access thereto pursuant to this order as constituting private, confidential or privileged commercial and financial information (hereinafter referred to as "Proprietary Information") and shall neither be used nor dis-

closed except in accordance with this order. All material claimed to be Proprietary Information must be marked with an appropriate designation and submitted to the Commission on yellow paper so that it is easily identified for filing purposes.

2. Terms of Disclosure. All Proprietary Information made available pursuant to this order shall be given solely to counsel for the Commission and Montana Consumer Counsel (MCC), and shall not be used or disclosed except for the internal purposes of the PSC or the MCC, for the purposes of a proceeding before the Commission, or as otherwise permitted by subsequent PSC order. However, access to Proprietary Information may be authorized by counsel for the PSC or MCC (or counsel for such other party as may acquire access to said information pursuant to Paragraph 3 below) solely for the above described purposes, to those persons indicated by such party as being their expert consultants. Any such expert may not be an officer, director or employee (except legal counsel) of such party, or an officer, director, employee or stockholder, or member of an association or corporation of which any party is a member, subsidiary or affiliate. Any member of the PSC and any member of its staff, the MCC, and any member of his staff may also have access to the Proprietary Information made available pursuant to this order.

3. Petition for Proprietary Disclosure. Any member of the public or other interested party with proper standing may specially petition the Commission for access to the Proprietary Information pursuant to the terms of this order. Such Petitioner

must demonstrate to the PSC that his or her interest relates to the ratemaking, investigatory or other regulatory function of the PSC. The providing party shall receive notice of any such petition and shall have a period of 14 days thereafter to file an objection or response prior to the Commission's ruling. If such Petition is granted by the PSC, said party shall be accorded access to the Proprietary Information pursuant to the terms of this Order, and shall be bound by all its terms. Prior to disclosure, said party shall submit signed nondisclosure agreements (Exhibit "A") pursuant to Paragraph 4 below.

4. Nondisclosure Agreement. Prior to giving access to Proprietary Information as contemplated in Paragraphs 2 and 3 above, counsel for the party seeking review of the Proprietary Information shall deliver a copy of this order to such person, and prior to disclosure such person shall agree in writing to comply with and be bound by this order. In connection therewith, Proprietary Information shall not be disclosed to any person who has not signed a nondisclosure agreement in the form which is attached hereto and incorporated herein as Exhibit "A." The nondisclosure agreement (Exhibit "A") shall require the person to whom disclosure is to be made to read a copy of this Order and to certify in writing that they have reviewed the same and have consented to be bound by its terms. The agreement shall contain the signatory's full name, permanent address, employer and the name of the party with whom the signatory is associated. Such

agreement shall be delivered to counsel for the providing parties and the Commission.

5. Delivery of Documentation. Where feasible, Proprietary Information will be marked as such and delivered to appropriate counsel. In the alternative, the Proprietary Information may be made available for inspection and review by counsel, staff and experts, at a time and place mutually agreed on by the parties, unless otherwise directed by the Public Service Commission.

6. Challenge to Confidentiality. This order establishes a procedure for the expeditious handling of information that a providing party claims is confidential; but it shall not be construed as an agreement or ruling on the confidentiality of any such information. Any party to a proceeding before the PSC, the MCC, any member of the public or interested party with proper standing, or the Commission upon its own motion, may challenge a providing party's claim of confidentiality at any time. Any such Petition or Motion must be served upon the appropriate providing party or parties, and the providing party may then file a response or objection within 14 days thereafter. A providing party's response may also request a hearing or oral argument before the Commission, including its grounds for such request.

(a) In the event that the PSC or MCC are unable to agree that certain documents, data, information, studies or other matters constitute private, confidential or privileged commercial and financial information, the entity objecting to the privacy claim shall forthwith submit the matter to the Commission for its

review. When the Commission rules on the question of whether any documents, data, information, studies or other matters are Proprietary Information, the Commission will enter an order resolving the issue.

(b) Any appropriate person or entity (as described above) may seek by appropriate pleading to have documents that have been designated as Proprietary Information in accordance with this order, removed from the protective requirements of this order and placed in the public record. If the confidential nature of this information is so challenged, resolution of the issue shall be made by a Hearing Examiner and/or the Commission after consideration of briefs and/or proceedings in camera, which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such Proprietary Information shall be present. The record of any such in camera hearing shall be marked "CONFIDENTIAL--SUBJECT TO A PROTECTIVE ORDER." It shall be transcribed only upon agreement of all participating parties, or by order of the Hearing Examiner or the Commission; and in that event shall be separately bound, segregated, sealed, and withheld from inspection by any person not bound by the terms of this order, unless and until released from the restrictions of this order through agreement of the parties or pursuant to an order of the Hearing Examiner or the Commission. The Court Reporter shall also be required to sign an Exhibit "A." In the event that the Hearing Examiner or the Commission should rule in response to such a pleading that any information should be

removed from the protective requirements of this order, the parties shall not disclosure such information or use it in the public record for a period of seven (7) business days thereafter, so that the providing party shall be afforded a reasonable opportunity to seek a stay or other appropriate relief.

7. Seal. While in the custody of the PSC and MCC, materials subject to this order shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER," and due to its private nature shall not be considered as records in the possession or retained by the PSC or MCC within the meaning of the open meetings or public records statutes.

8. Use in Pleadings, Briefs, etc. Where reference to Proprietary Information is required in pleadings, briefs, argument or motions, it shall be by citation to title or exhibit number, or some other nonconfidential description. Any further use or substantive reference to Proprietary Information shall be placed in a separate section of the pleading or brief and submitted to the Commission under seal. This sealed section shall be served only upon counsel (one copy each) who have signed an Exhibit "A." All the protections afforded in this order apply to materials prepared and distributed pursuant to this paragraph.

9. (a) Use in Commission Orders. The Hearing Examiner or the Commission will attempt to refer to proprietary Information in only a general or conclusionary form, and to the greatest extent possible, will avoid reproduction of Proprietary Information in any decision or ruling. If it is necessary to discuss

Proprietary Information in greater detail, it shall be placed in a separate section of the order under seal. This sealed section shall be served only on counsel (one copy each) who have signed an Exhibit "A." Counsel for other parties shall receive the cover sheet to the sealed portion and may review the sealed portion on file with the Commission after signing an Exhibit "A."

(b) Summary for Record. If deemed necessary by the Commission, the providing party shall prepare a written summary of the Proprietary Information referred to in a decision or order, for placement on the public record.

10. The PSC and its counsel and staff, and the MCC and its counsel and staff, shall be bound by the terms of this Order.

11. Segregation of Files. All Proprietary Information filed with the Commission shall be sealed by the Commission, segregated in the files of the Commission, and withheld from inspection by any person not bound by the terms of this order, unless such Proprietary Information is released from the restrictions of the order either through agreement of the parties, an order of the Commission, or an order of a Court having competent jurisdiction. All written Proprietary Information coming into the possession of the MCC under this order may be retained by him in his office files, but shall be withheld from inspection by others, except for his staff and his counsel, unless released by agreement, an order of the Commission and/or an order of a court.

12. Preservation of Confidentiality. All persons who may be entitled to receive, or who are afforded access to any Propri-

etary Information by reason of this order shall neither use nor disclose the Proprietary Information for purposes of business or competition, or any purpose other than those described in Paragraph 2 above, and then solely as contemplated herein, and shall take reasonable precautions to keep the Proprietary Information secure and in accordance with the purposes and intent of this order.

13. Reservation of Rights. The persons hereto affected by the terms of this Protective Order retain the right to question, challenge, and object to the admissibility (in any proceeding before the PSC or other appropriate body) of any information furnished under the terms of this Protective Order, on the grounds of relevancy or materiality.

This order shall in no way constitute any waiver of the rights of any interested party to contest any assertion or finding on the right of privacy, confidentiality or privilege, and to appeal any such determination of the Commission.

14. Applicability/Term. This order shall only apply to information supplied to the PSC pursuant to Schedule 27 of the 1993 PSC Annual Report Forms for Telecommunications Utilities. This order shall apply to all Montana telecommunications utilities which request confidential treatment of the Schedule 27 information. A telecommunications utility shall indicate its choice to file Schedule 27 information as proprietary (subject to the terms of this Order) by filing all such information on yellow paper.

This Protective Order shall only be in effect for the 1993 PSC Annual Report Forms for Telecommunications Utilities (due 3-15-94), unless modified pursuant to Paragraph 15 below. It shall not apply to Annual Reports filed in subsequent years unless a new motion is filed and granted by the PSC.

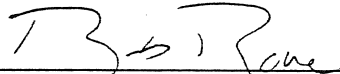
15. Amendment or Modification. The Commission retains jurisdiction of this matter and may alter or amend the provisions hereof as it deems appropriate, upon its own motion, or a motion by an appropriate party, after reasonable notice.

Done and Dated this 7th day of March, 1994 by a vote of 3-2.

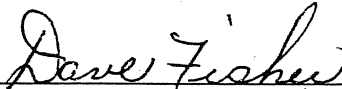
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION



BOB ANDERSON, Chairman
(Voting to Dissent)



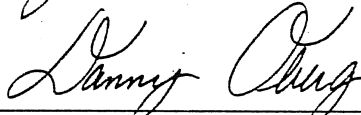
BOB ROWE, Vice Chairman
(Voting to Dissent-Attached)



DAVE FISHER, Commissioner



NANCY MCCAFFREE, Commissioner



DANNY OBERG, Commissioner

ATTEST:



Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

DISSENT OF COMMISSIONER ROWE
PROTECTIVE ORDER, DOCKET NO. N-93-105, ORDER NO. 5777

I dissent from the Commission's decision to issue a protective order covering the compensation received by top telephone company employees. This information is filed with the Commission as part of each company's annual report. It will continue to be available to the Commission, the Montana Consumer Counsel, and conceivably to other parties able to meet the requirements of the protective order. It will not be available to members of the interested public or their representatives.

Typically, protective orders are granted under the Commission's statutes and rules for business "trade secrets." As telecommunications and other utility enterprises become more competitive, the scope of material for which this protection is sought broadens. Unfortunately, timely and efficient processing of contested cases often requires granting general protective orders up front, placing the burden on concerned parties to request of the Commission that particular information be made public. In some instances, as in the recent US WEST "sale of exchanges" case, Commissioners have taken the initiative to have information publicly disclosed.

Although perhaps a necessary evil, broad protective orders have two harmful consequences. First, they do impinge on the public's legitimate right to know. Second, they make it more difficult for the Commission and other parties to handle material in an appropriate way. The Commission should review its general policy on protective orders, and consider efficient and effective

ways to shift the burden to the party requesting protection to prove that in fact trade secrets are involved.

The present case does not involve routine approval of the Commission's standard protective order. The specific question of the proprietary nature of compensation was briefed my members of the industry and considered by the Commission in a lengthy public work session. This matter involves much closer-than-usual consideration of a specific confidentiality issue. Therefore, despite the disclaimer at page two of the Commission's order, the Commission majority is "deciding or expressing" an "opinion as to whether the subject information is or is not a trade secret, or otherwise constitutionally protected."

Trade secrets are defined in Section 30-14-402, MCA, as information which "derives independent economic value" from not being generally known. The Commission's statutes extend protection to trade secrets. Section 69-3-105(2), MCA. There is no room for serious argument that information about management compensation is somehow a trade secret. It is not.

Rather, the Commission sought to balance the public's right to know with the individual right of privacy. Both rights receive exceptionally strong protection under the Montana Constitution. Article II, Section 8, protects the public right to participation. Section 9, protects the public right to know. These rights are implemented in the general governmental statutes. They are also the bedrock of the Commission's own procedures.

Article II, Section 10, declares Montana's unique right of individual privacy. Privacy is of fundamental importance to Montanans.

Both the Commission majority and I struggled with this balance. I voted for the right to know while recognizing that for smaller companies the Commission's form does require reporting for some non-management employees. I would have considered narrow exceptions to disclosure for these employees. It might also have been possible to recognize the privacy interest by disclosing compensation without disclosing individual names; however, this approach does not fully effectuate either the right to know or the right of privacy.

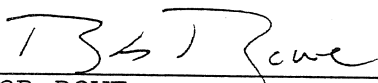
Utilities are regulated because they are affected with vital public interests. The question of compensation is of general public concern, and is of specific importance in cases concerning utility revenue requirements. The public sometimes focuses on the perceived lavish compensation packages offered the executives of large corporations. However, management compensation may be an even more significant contributor to revenue requirements for small or closely-held companies.

Expectations of privacy must be reasonable. The compensation received by the top five executives of publicly-traded companies must be disclosed pursuant to Securities and Exchange Commission rules. Reports to shareholders list executive compensation. The wages and salaries of public appointees and employees are public, as are the names, addresses, and salaries of

private employees working on publicly-funded projects.¹ Other personnel matters are more commonly considered private. Other utilities, including water companies, file reports with the Commission which list compensation. Protective orders have not generally been requested for these, and have not been granted.

Justice Brandeis stated a public utility is "the substitute for the State in the performance of the public service, thus becoming a public servant." Missouri ex. rel. Southwestern Bell v. Missouri PSC, 262 U.S. 276, 291 (1923). Compensation for top employees is one element of the much larger volume of information filed with the Commission by regulated utilities. Seen in this light, the expectation of privacy becomes less reasonable, and the balance tips in favor of the right to know. However, the public would err to focus too narrowly on compensation without paying attention to larger questions of cost and cost causation.

RESPECTFULLY SUBMITTED this 7th day of March, 1994.



BOB ROWE
Vice Chair

¹ 38 Attorney General Opinion No. 109, p. 375 (1975); 43 Attorney General Opinion No. 6, p. 12 (1989).